In the District Court of the United States for the Middle District of North Carolina at Greensboro

Civil No. 219 G

GUY M. TURNER AND FRANK B. TURNER, DOING BUSINESS AS TURNER'S TRANSFER, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered August 1, 1944, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' complaint to set aside an order of the Interstate Commerce Commission. The Commission's order, dated December 30, 1943, granted to appellants a certificate as a common carrier by motor vehicle over irregular routes un-

[1] The Court also made findings of fact and conclusions of law and rendered an opinion.

der the "grandfather clause" of Section 206 (a) of Part II of the Interstate Commerce Act (49 U. S. C. 306a), but denied authority to serve other territory included in the application.[2] An appeal was allowed on August 21, 1944, and a stay pending appeal was granted, conditioned upon

[2] The Commission granted authority to transport:

(1) commodities requiring special equipment and handling by reason of size or weight, and machinery, between points in North Carolina, on the one hand, and, on the other, points in Georgia, South Carolina, Tennessee, Virginia, Maryland, Pennsylvania, New Jersey, New York, Massachusetts, and Rhode Island, traversing Connecticut, Delaware, and the District of Columbia for operating convenience, (2) household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Michigan, Indiana, Illinois, Pennsylvania, Delaware, Maryland, New Jersey, New York, Connecticut, Massachusetts, Rhode Island, and the District of Columbia, (3) empty machinery cases (wooden boxes), from all points in North Carolina to Reading, Pa., (4) general commodities, except articles of unusual value, dangerous explosives, commodities in bulk, commodities requiring special equipment and handling by reason of size or weight, machinery, and household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, between points in Guilford, Randolph, Chatham, and Almance Counties, N. C., on the one hand, and, on the other, Philadelphia, Pa., Baltimore, Md., and all points in Ohio, traversing West Virginia, Virginia, Delaware, and the District of Columbia for operating convenience, and (5) empty containers, skids, and rejected or damaged shipments from and to the foregoing points in either direction.

Appellants applied for authority to transport:

(1) general commodities, except loose bulky commodities, currency, bullion, dangerous explosives, and articles of virtu, (a) between points in North Carolina, South Carolina, and

the prompt docketing of the case. Appellants have never made any formal service upon appellees of a complete set of the appeal papers as required by Rule 12, paragraph 2 of the Rules of the Supreme Court. However, defendants on August 11, 1944, prior to the allowance of the appeal, received certain of the required appeal papers in a letter from the clerk of the court. The order allowing appeal was received by defendants in a similar letter on August 23, 1944.

The basis for the Commission's action in thus restricting appellants' rights is indicated by the following statement from its opinion:

> Although the operations conducted prior to June 1, 1935, may have been more extensive than those authorized herein, applicant cannot be granted "grandfather

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irginia, and (b) between points in those three States, on the one hand, and, on the other, points in Georgia, Alabama, Tennessee, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, (2) of household goods between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, and (3) of machinery, construction materials, and other heavy or bulky commodities requiring the use of special equipment between points in Alabama, Georgia, South Carolina, North Carolina, Tennessee, Virginia, West Virginia, Ohio, Indiana, Michigan, Illinois, District of Columbia, Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts.

> rights" to serve points and areas which, according to the complete evidence of operations since the statutory date, have not been served substantially and continuously since that time. In reaching this conclusion we have been guided by the principles announced by the Supreme Court in *U. S.* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475.

Appellants contended before the District Court that the Commission, in restricting their rights, erroneously applied the law to the facts found, and particularly erred in requiring an irregular route carrier to establish continuity of service after January 1, 1935. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

The Commission, as clearly appears from its quoted statement above, applied a test of substantiality of service in determining the geographical scope of appellants' operations during the "grandfather" period. As the Commission indicates, such action was clearly responsive to the holding of this Court in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480–481. There the Court, in sustaining geographical limitations imposed by the Commission under the "grandfather clause" upon an irregular route carrier, said:

> The precise delineation of the area or the specification of localities which may be

> serviced has been entrusted by the Congress to the Commission * * *. The Act provides the test of "bona fide operation." That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is "actual rather than potential or simulated service" which is required. *McDonald* v. *Thompson*, 305 U. S. 263, 266. *Substantial, as distinguished from incidental, sporadic, or infrequent, service is required.* Substantial service actually rendered may have been confined to narrow limits. *Loving* v. *United States*, 32 F. Supp. 464, aff'd 310 U. S. 609. Ability to render the service throughout the wide reaches of the territory, which the applicant professed to be willing to serve, may not have existed * * * *While service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service.* [Italics supplied.]

The Commission having thus applied the correct legal test, its findings of fact as to the substantiality of past service in different areas must be sustained, unless patently in error or not supported by substantial evidence. *Alton R. Co.* v. *United States*, 315 U. S. 15, 23; *United States* v. *Carolina Carrier Corp., supra*, 482–483. Here the Commission had before it an unusually complete record including exhibits showing all ship-

ments transported by appellants from April 1936 to December 1941, and its particularly painstaking report analyzes the evidence in detail. The District Court's conclusion that the Commission's findings were supported by substantial evidence is clearly correct and should be sustained.

Appellants' contention that because they engaged in only irregular route or territorial operations, rather than regular route operations, they were not required under the "grandfather clause" to establish continuity of service after June 1, 1935, is equally without merit. This is obvious from the statutory language. Section 206 (a) of the Interstate Commerce Act (49 U. S. C. 306 (a))[3] requires an applicant to establish not only bona fide operation on June 1, 1935, but also that he "has so operated since that time." And this is true not only of operations "over the route," but also, "within the territory for which application is made."[4] As pointed out in the opinion of the

[3] This section provides:

"If any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation."

[4] While the Commission may take into consideration the irregular route nature of the operations in determining whether in a particular case service is substantial and continuous (see *United States* v. *Carolina Carriers Corp.*, *supra*, 481), that is not to say that a different legal test is to be applied for those carriers than for regular route carriers.

District Court, to disregard the requirement of continued operation following June 1, 1935, would be to delete from the Act the words, "and has so operated since that time." Furthermore, this Court held two years ago in *Gregg Cartage & Storage Co.* v. *United States,* 316 U. S. 74, 78, that applicants under the "grandfather clause" must establish continuity of operations beyond the "grandfather" date, June 1, 1935, and this was not a novel holding even then. The Court there said:

> Appellants contend that the Commission and the court below erroneously construed § 206 (a) of the Motor Carrier Act in holding that, excepting the specified interruptions of service, the statute required continuous operation from June 1, 1935, until the hearing by the Commission on the application. *We have, however, held to the contrary. United States* v. *Maher,* 307 U. S. 148, petition for limited rehearing denied, 307 U. S. 649. *Hoey* v. *United States,* 308 U. S. 510; *Lubetich* v. *United States,* 315 U. S. 57. [Italics supplied.]

For the foregoing reasons it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

CHARLES FAHY,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

Certificate of Service

I hereby certify that I served a copy of the attached motion to affirm upon each of the following named counsel for appellants this 14th day of September 1944:

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